

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

DARNELL L. RUSSELL,

Petitioner,

vs.

SCOTT FRAKES, Director of Nebraska Department of Correctional Services; and MICHELLE CAPPS, Warden of Nebraska State Penitentiary, Lincoln, Nebraska;

Respondents.

**8:19CV213**

**MEMORANDUM AND ORDER**

This matter is before the court on the Notice of Appeal ([filing no. 19](#)) and Motion for Extension of Time to File a Memorandum Brief in Support of Certificate of Appealability ([filing no. 20](#)) filed by Petitioner Darnell L. Russell on June 1, 2020.<sup>1</sup>

Petitioner has failed to include the \$505.00 appellate filing and docket fees. Petitioner has not previously been granted leave to proceed in forma pauperis in the district court in connection with his § 2254 petition. Thus, Fed. R. App. P. 24(a)(3), which continues in forma pauperis status on appeal without further authorization, does not apply. Within 30 days, Petitioner must either submit the \$505.00 filing and docket fees to the clerk's office or submit a request to proceed in forma pauperis. Petitioner's appeal cannot be processed until either the appellate filing fee is paid or the question of Plaintiff's authorization to proceed on appeal in forma pauperis is resolved.

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<sup>1</sup> Petitioner's Notice of Appeal ([filing no. 19](#)) and motion ([filing no. 20](#)) were filed in this court on June 1, 2020. However, Petitioner included a Declaration of Mailing ([filing no. 21](#)) that indicates his pleadings were placed in the institutional mail system on May 27, 2020.

With respect to Petitioner's Motion for Extension of Time to File a Memorandum Brief in Support of Certificate of Appealability ([filing no. 20](#)), the court denied Petitioner a certificate of appealability when it ruled on his Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. ([Filing No. 16 at CM/ECF p. 4](#)); Rule 11 of the *Rules Governing Section 2254 Cases in the United States District Courts* ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). While Petitioner has not filed an express request for a certificate of appealability from the Eighth Circuit Court of Appeals, Petitioner's Notice of Appeal "constitutes a request addressed to the judges of the court of appeals" under Rule 22(b)(2) of the Federal Rules of Appellate Procedure. Petitioner "cannot take an appeal unless a circuit justice or a circuit . . . judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). Accordingly, to the extent Petitioner seeks additional time to file a brief in support of any request for a certificate of appealability in this court, his motion is denied as such request should be directed to the Eighth Circuit Court of Appeals.<sup>2</sup>

IT IS THEREFORE ORDERED that:

1. Petitioner is directed to submit the \$505.00 fee to the clerk's office or submit a request to proceed in forma pauperis within 30 days.
2. The clerk of the court is directed to send to Petitioner the Form AO240 ("Application to Proceed Without Prepayment of Fees and Affidavit").
3. Petitioner's Motion for Extension of Time to File a Memorandum Brief in Support of Certificate of Appealability ([filing no. 20](#)) is denied without prejudice to reassertion in the Eighth Circuit Court of Appeals.

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<sup>2</sup> Petitioner is reminded, however, that his appeal to the Eighth Circuit Court of Appeals cannot be processed until the appellate filing fee is paid or the question of Petitioner's authorization to proceed in forma pauperis on appeal is resolved.

4. The clerk of the court is directed to set a pro se case management deadline in this matter with the following text: **July 6, 2020:** Check for MIFP or payment.

Dated this 3rd day of June, 2020.

BY THE COURT:



Richard G. Kopf  
Senior United States District Judge